In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 502

DILLARD MORRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

At his jury trial in the United States District Court for the Southern District of New York, petitioner was represented by retained counsel. He was convicted of two narcotics violations and on December 11, 1964, he was sentenced, as a second offender, to concurrent terms of 20 years' imprisonment. On appeal, he was represented by new retained counsel; by opinion and judgment dated July 26, 1965, the court of appeals affirmed. 348 F. 2d 1003. On November 8, 1965, certiorari was denied. 382 U.S. 905.

On June 26, 1967, through a third attorney, petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction on the ground that he had not enjoyed

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at his trial his Sixth Amendment right to the assistance of counsel. The motion specified various respects in which the assistance rendered by his trial lawyer had assertedly not been "effective" (R. 1–24). In an opinion and order dated November 17, 1967 (Pet. App. 1a–6a), the district court denied the motion, without an evidentiary hearing, on the ground that it was apparent from the motion, files, and records that the motion was without merit. The court of appeals affirmed without opinion (Pet. App. 7a–8a).

The judgment of the court of appeals was entered on June 11, 1968 (Pet. App. 7a).[1] No request for an extension of time within which to file a petition for a writ of certiorari was granted or applied for and therefore, under 28 U.S.C. 2101(c), the time for invoking the certiorari jurisdiction of this Court expired on September 9, 1968. The petition was not filed

[1] The petition correctly notes that the judgment of which review is sought was entered on June 11, 1968 (Pet. 1). The notation "JUDGMENT ENTERED 8/13/68 JOHN J. OLEAR, JR., *Clerk*" (Pet. App. 8a), which appears following the copy of the judgment of the court of appeals printed in the appendix to the petition for a writ of certiorari (it does not appear on the certified copy of the judgment on file in the office of the Clerk of this Court), presumably refers to the date on which the court of appeals' mandate was entered in the records of the district court. (Mr. Olear is the clerk of the latter court.) The date thus has no significance in determining the timeliness of the petition. The statement in the petition (under the heading "Jurisdiction") that the judgment of the court of appeals was entered on "July 26, 1965" (Pet. 2) is an evident inadvertence; that is the date of entry of the judgment of the court of appeals affirming the conviction on direct review.

until September 11, 1968.[2] It is thus out of time under the statute and Rule 22(3) of this Court. See, also, Stern and Gressman, *Supreme Court Practice* (3rd ed.), § 6–1; Memorandum in Opposition (pp. 8–9) in *Morales et al.* v. *Immigration and Naturalisation Service,* Nos. 77 Misc. and 78 Misc., this Term.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied or dismissed.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1968.

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[2] We are advised by the Clerk that the petition was received in his office (unaccompanied by the filing fee) on September 10, but the time for filing had already expired even as of that date.

U. S. GOVERNMENT PRINTING OFFICE: 1968